STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

CHARLES T. RUSSELL, Individually and
as Trustee UTA Dated 3-6-92,

Plaintiff,

vs.

Case No. 2006-0019-CZ

BROWNSTONE ENTERTAINMENT, LLC;
PATRICK A WILEY;
BENJAMIN HOLLAWAY;
RYM-TECHNOLOGY HOLDINGS,
a Michigan corporation; and
TALON GROUP, INC.,
a Michigan corporation;

Defendants.

_____/

OPINION AND ORDER

Defendants Brownstone Entertainment, L.L.C. and Benjamin Hollaway move for summary disposition under MCR 2.116(C)(7).

I

Plaintiff Charles T. Russell filed this action on January 4, 2006 asserting defendant Brownstone Entertainment executed a promissory note in his favor for $700,000 on June 30, 2004. Defendants Patrick A. Wiley and Hollaway guaranteed the note. The note was due and payable by July 31, 2004, but defendant Brownstone Entertainment has only paid $63,000.

Plaintiff avers he received a promissory note from defendant Wiley on October 5, 2004 worth $700,000 if paid on or before December 31, 2004, or $800,000 if paid thereafter. The note was due and payable by September 16, 2005 after which it would bear interest at the rate of 7%

per annum. Defendant Wiley agreed in the note that its payment would be secured by an assignment of partial interest in an agent agreement and the execution of a quit claim deed to property in Oakland County. Defendant Wiley presented a title insurance commitment issued by defendant Talon Group, Inc. that indicated he was the fee simple owner of the property. Plaintiff was to be able to demand release of the money subject to the assignment and/or sell the real estate in the event of a default in payment of the note. Defendant Wiley has paid nothing on the note and collection efforts have not been successful; defendant Wiley never had any interest in the real estate and the assignment has not been honored by defendant Rym-Technology Holdings.

Plaintiff avows he also received a promissory note from defendant Wiley on November 12, 2004 for $375,000. The note was due and payable on April 25, 2005 and would accrue interest at the rate of 7% thereafter. This note was also to be secured by the Oakland County real estate and the aforementioned agent agreement assignment. The note remains unpaid and collection efforts have been unsuccessful.

Accordingly, plaintiff's complaint apparently alleges: I. Breach of the June 30, 2004 Promissory Note against defendants Brownstone Entertainment, Wiley and Hollaway; II. Breach of the October 5, 2004 Promissory Note against defendant Wiley; III. Breach of the November 12, 2004 Promissory Note against defendant Wiley; IV. Fraud against defendant Wiley; V. Negligence against defendant Talon Group and VI. Declaratory Relief against defendant RYM-Technology.

On July 17, 2006, plaintiff stipulated to a dismissal of Count II, only, without prejudice.

Defendants Brownstone Entertainment and Hollaway now move for summary disposition.

II

In reviewing a motion under MCR 2.116(C)(7), a court will accept the allegations of the complaint as true unless contradicted by documentary evidence. *Pusakulich v City of Ironwood,* 247 Mich App 80, 82; 635 NW2d 323 (2001). The reviewing court must consider any affidavits, depositions, admissions and other documentary evidence submitted by the parties that would be admissible as evidence at trial. *Id.*

III

In *Paterek v 6600 Ltd,* 186 Mich App 445, 449; 465 NW2d 342 (1990), the court stated:

> As with other contracts, the validity of a contract of release turns on the intent of the parties. *Trongo v Trongo,* 124 Mich App 432, 435; 335 NW2d 60 (1983), lv den 417 Mich 1100.32 (1983). To be valid, a release must be fairly and knowingly made. *Denton v Utley,* 350 Mich 332; 86 NW2d 537 (1957); *Binard v Carrington,* 163 Mich App 599, 603; 414 NW2d 900 (1987); *Trongo, supra.* A release is not fairly made and is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct. *Theisen v Kroger Co,* 107 Mich App 580, 582-583; 309 NW2d 676 (1981).

In *Rose v Lurvey,* 40 Mich App 230, 234; 198 NW2d 839 (1972), our Court of Appeals explained:

> It is a general principle of contract law that courts will not ordinarily look into the adequacy of the consideration in an agreed exchange. Equity will, however, grant relief where the inadequacy of consideration is particularly glaring. Thus in *Hake v Youngs,* 254 Mich 545, 550 (1931), the Michigan Supreme Court stated the rule that:
>
> "Mere inadequacy of consideration, unless it be so gross as to shock the conscience of the court, is not ground for rescission."
>
> In *Gerycz v Zagalski,* 230 Mich 381, 384 (1925), the only consideration moving to plaintiffs for a deed of their home was an assignment of a land contract for the purchase of a farm which was at the time in default. The Michigan Supreme Court in setting aside the deed of plaintiffs' home stated:
>
> "Plaintiffs traded their home for a farm, not for a prospective lawsuit . . . over a defaulted contract, the successful outcome of which was very doubtful. We think there was such a failure of consideration as justified a court of equity in granting plaintiffs relief."

In the instant matter, plaintiff has proffered evidence suggesting defendant Wiley had no interest in the real property securing the October 5, 2004 Promissory Note. In addition, plaintiff has not been successful in enforcing the agent agreement assignment securing the October 5, 2004 Promissory Note. Hence, the October 5, 2004 Promissory note—which serves as consideration for the October 5, 2004 release—may indeed be uncollectible.

If the October 5, 2004 Promissory Note is uncollectible, the October 5, 2004 release would likely fail for lack of adequate consideration. Moreover, defendant Wiley's alleged misrepresentations in obtaining the release could serve to invalidate it. Therefore, a genuine issue of material fact exists with respect to the validity of the October 5, 2004 release that precludes entry of summary disposition in favor of plaintiff or defendants Brownstone Entertainment and Hollaway.

IV

Based on the foregoing, it is hereby

ORDERED Defendants Brownstone Entertainment, L.L.C. and Benjamin Hollaway's motion for summary disposition is DENIED under MCR 2.116(C)(7), and it is further

ORDERED Plaintiff Charles T. Russell's counter-motion for summary disposition is also DENIED under MCR 2.116(I)(2).

This *Opinion and Order* neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

SO ORDERED.

DATED:

PETER J. MACERONI
CIRCUIT JUDGE

Peter J. Maceroni,
Circuit Judge

AUG 2 9 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

cc: Clarence Tucker
Lewis Thumm